

Joshua Koltun (Bar No. 173040)  
One Sansome Street  
Suite 3500, No. 500  
San Francisco, California 94104  
Telephone: 415.680.3410  
Facsimile: 866.462.5959  
joshua@koltunattorney.com

Attorney for Third Party Witnesses  
Below the Blue,  
Marine Taxonomic Services, Ltd,  
Seth Jones, and Monique Rydel-Fortner

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA SPORTFISHING  
PROTECTION ALLIANCE,

Plaintiff,

v.

PACIFIC BELL TELEPHONE COMPANY

Defendant

Case 2:21-cv-00073-JDP

**INFORMAL BRIEF IN SUPPORT OF  
BELOW THE BLUE'S  
PROPOSED MOTION TO PARTIALLY  
RECONSIDER ORDER TO COMPEL**

Zoom Hearing: December 21, 2023

Time: 10 am

Courtroom 9

Judge: Hon. Jeremy D. Peterson

***The material as to which BTB/MTS has no objection – all of which relates specifically to the cables in Lake Tahoe at issue in this litigation -- has been or is being produced.*** The production included *thousands of pages of documents* responsive to the subpoena, including maps, geolocation data, and videos, concerning those two cables. BTB/MTS role in this case was limited to finding those cables and bringing them to the attention of Plaintiff. At no point did BTB/MTS conduct sampling of Lake Tahoe water for Plaintiff. MTS also conducted an underwater survey of the Cables for the League to Save Lake Tahoe, created a video showing the length of the cable, with areas of concern marked with zip-ties, and created maps showing GPS coordinates of those points. All that has been produced. A few remaining documents may be located and produced.

***What is at issue is whether AT&T can obtain information concerning the investigation that BTB/MTS conducted with the Wall Street Journal around the country, after this case had settled.*** BTB/MTS assisted the *Journal* (and in a separate parallel investigation, EDF) in investigating lead-clad cables at multiple sites around the country, of which Lake Tahoe was only one. All three entities expected to – and did -- publish reports concerning these investigations.

***AT&T originally sought this information directly from the Journal, and is now seeking to do an end-run around the Reporter's Privilege.*** On July 27, AT&T sent the Wall Street *Journal* a subpoena for documents concerning its nationwide reporting on lead-clad cables, with a letter vigorously disputing that reporting. That subpoena was later served and then withdrawn, and the subpoenas to BTB/MTS issued. BTB/MTS asserts the Reporters Privilege on all such material and has not produced it to either side. Plaintiff has respected BTB/MTS's assertion of privilege.

***It is appropriate for the Court to partially reconsider its order to compel with respect to BTB/MTS's claim of privilege, because BTB/MTS raised its objection but was unable to litigate it until it secured the undersigned counsel.*** The Reporter's Privilege is "[r]ooted in the First Amendment." *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993) ("*Shoen I*"). First Amendment rights can only be deemed waived "upon clear and convincing evidence that the waiver is knowing, voluntary and intelligent." *Leonard v. Clark*, 12 F.3d 885, 889 (9th Cir. 1993). BTB/MTS timely asserted its objections to producing documents but was unable to litigate them until now because – through no fault of its own -- it was unable to secure counsel that could litigate the issue. (The only

1 “legal representation” offered by the Vance Center is that its “lawyers work with clients to identify  
 2 their needs, and ... then invite law firms to work on the projects.” [Law Firms & Clearinghouses |](#)  
 3 [Cyrus R. Vance Center For International Justice](#)). DE 87 at 1-2; *Palandjian v. Pahlavi*, 103 F.R.D.  
 4 410, 413 (1984) (reporter who “attempted, however inartfully” to assert the privilege did not waive it).  
 5 The motion to compel was granted because, without counsel, BTB was unable to oppose it. It would  
 6 be a manifest injustice to allow AT&T to obtain information concerning the *Journal’s nationwide*  
 7 reporting without allowing full briefing of the privilege issue.

8 ***Anyone who intends to publish information to the public is a “reporter” and may invoke the***  
 9 ***Reporter’s Privilege.*** *Shoen I*, 5 F.3d at 1293. The “reporter” need not have any association with the  
 10 mainstream media. *Id.* The purpose of the privilege is to protect “the free flow of information to the  
 11 public.” *Id.* at 1292. BTB/MTS is a reporter, because it had “the intent to use material - sought,  
 12 gathered or received - to disseminate information to the public and ... such intent existed at the  
 13 inception of the newsgathering process.” *Id.* at 1293-94; DE 65-14 (Request 9, referring to BTB/MTS  
 14 published report). That BTB is an environmental activist organization in no way undercuts its  
 15 privilege. *Anti-Defamation League v. Sup. Ct.*, 67 Cal.App. 4th 1072, 1092-94 (public advocacy  
 16 organization may invoke Reporter’s Privilege). If BTB/MTS had acted independently of either the  
 17 *Journal* or EDF it would still be entitled to claim the privilege. That it undertook these separate  
 18 investigations in collaboration with the *Journal* and EDF only strengthens the assertion of privilege.

19 ***The Privilege covers all information that the reporter has chosen not to publish.*** *Shoen I*, 5  
 20 F.3d at 1295. There need not have been a promise of confidentiality. *Id.* AT&T contends that EDF’s  
 21 disclosure of certain information that it had not published in its report constitutes a “subject matter”  
 22 waiver of all information concerning lead-clad cables held by EDF, BTB/MTS, or the *Journal*. That  
 23 unsound contention flies in the face of the essence of the Reporter’s Privilege: to protect ***unpublished***  
 24 information. The doctrine of “subject matter waiver” which comes from the attorney-client context, is  
 25 inapplicable to the Reporter’s Privilege. *Damiano v. Sony Music Ent., Inc.*, 168 F.R.D. 485, 499  
 26 (D.N.J. 1996). The Reporter’s privilege may be waived only where the reporter has given information  
 27 to one litigant but not the other. *Michael v. Estate of Kovarbasich*, , 2015 U.S. Dist. LEXIS 168901,  
 28 at \*12 (C.D. Cal. Dec. 11, 2015). Here BTB/MTS is asserting the privilege against both parties.

1 ***AT&T cannot meet the heavy burden to overcome the Reporter's Privilege.*** To overcome  
 2 BTB/MTS's privilege, AT&T must show that the requested material is "(1) unavailable despite  
 3 exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an  
 4 important issue in the case." *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995) (*Shoen II*). That is a  
 5 heavy burden, designed to "prevail in all but the most exceptional cases." *Id.*

6 ***AT&T has not exhausted other sources; quite the contrary.*** AT&T insists not only that it is  
 7 ***possible*** to assess the safety of the lead-clad cables in Lake Tahoe independently of the *Journal's*  
 8 reporting, but (i) that it backed out of the Consent Decree precisely to enable such testing ***by the EPA***  
 9 ***and "regulators"***, and (ii) that ATT has already performed such testing. DE 41 at 2 & Exh A at 3; DE  
 10 91 at 1:12-16. In any event, BTB/MTS has produced the video it created that shows points of damage  
 11 or concern marked with zip-ties, and maps showing precise geolocations of those spots. The parties'  
 12 experts, as well as the EPA and "regulators" are free to use such information in their own testing.<sup>1</sup>

13 ***AT&T's case hardly "rises or falls" on the material it is seeking; on the contrary that***  
 14 ***information is not relevant at all.*** To overcome the privilege, the information sought must be  
 15 "clearly relevant to an important issue in the case," *id.*; the claim for which the information is to be  
 16 used must "virtually rise[] or fall[] with the admission or exclusion of the proffered evidence." *Krase*  
 17 *v. Graco Children Prods*, 79 F.3d 346, 351 (2d Cir. 1996). Here, the majority of the investigation that  
 18 BTB/MTS did with the *Journal* took place far away from Lake Tahoe; of no possible relevance. That  
 19 small portion of the material that relates to Lake Tahoe is also irrelevant, because the *Journal's*  
 20 reporting on Lake Tahoe is not at issue here.

21 AT&T is seeking this information to rebut the *Journal's* reporting in the public arena. But this  
 22 is a court of law, not the court of public opinion. BTB/MTS has produced everything AT&T needs to  
 23 defend this case. AT&T should not be allowed to abuse the discovery process to obtain anything else.

24 December 19, 2023

\_\_\_\_\_/s/ Joshua Koltun

25 \_\_\_\_\_  
 26 <sup>1</sup>By the same token, the information sought by this subpoena concerning BTB/MTS's investigation in  
 27 collaboration with the *Journal* and EDF is ***cumulative*** of information that EDF produced to AT&T,  
 28 not to mention the voluminous information that BTB/MTS itself recently produced.